Teoh Vin Sen v True Creation Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING UP NO D5–28–772 OF 2006
RAMLY ALI J
5 FEBRUARY 2008

Companies and Corporations — Winding up — Petition — Debt fully paid to petitioner before hearing of petition — Substitution of petitioner — Whether supporting creditors have right to substitute themselves as petitioners upon withdrawal of petition by earlier petitioner — Companies Act 1965 ss 218 & 219(2) — Companies (Winding Up) Rules 1972 r 33(1)

On 30 October 2006, Teoh Vin Sen, the petitioner, presented a winding up petition against True Creation Sdn Bhd, the respondent. On 17 January 2007, some 27 supporting creditors ('the creditors') obtained judgment against the respondent company with damages to be assessed before the registrar. The amount or quantum of damages payable was assessed on 31 May 2007 and taxed costs of RM22,956.50 was granted to the creditors. The creditors dissatisfied with the costs filed a review on taxed costs and thereafter on 16 August 2007 the court ordered that that the sum of RM37,956.50 including an allocatur fee be paid by the respondent company to the creditors. A statutory notice under s 218 of the Companies Act 1965 ('the Act'), in respect of the order dated 16 August 2007 for RM37,956.50, was thereafter served on the respondent company at its registered address and business address. On 18 September 2007, the petitioner appeared in open court to withdraw the petition on the grounds that the debt had been fully settled by the respondent company. At that stage the creditors objected to the petitioner's motion to withdraw the petition by undertaking to file an application for substitution of petitioners to the winding up petition. This was the creditors' application pursuant to r 33(1) of the Companies (Winding Up) Rules 1972 ('the 1972 Rules'), for an order that they be substituted as the petitioners to the winding up petition based on the judgment that they had already obtained against the respondent company on 17 January 2007. The creditors contended that their right to present the petition arose as from the date of the order, ie 17 January 2007 or alternatively on 16 August 2007 when the damages and costs to be assessed were confirmed and that both these dates were before the date of the hearing of their application for substitution as petitioners, which was 11 December 2007. The creditors further submitted that as supporting creditors they had the right under r 33 of the 1972 Rules to be substituted as the petitioners.

The respondent contended that the creditors could only substitute themselves as petitioners if their right to present the petition existed at the date when the petition was presented by the earlier petitioner, which was on 30 October 2006. The only issue before the court in this application was whether the creditors had the right to substitute the petitioner and continue with the winding up petition dated 30 October 2006 against the respondent company.

Held, dismissing the application with costs:

(1) As s 219(2) of the Act stipulates that 'the winding up petition will be deemed to have commenced at the time of the presentation of the petition for winding up', the applicant who is desirous of proceeding with the petition must show that at the time of the first presentation of the petition by the earlier petitioner he had a right to present the said petition. The facts of the instant application showed that as at the time when the petition was presented by the earlier petitioner on 30 October 2006, the creditors were not creditors to the respondent as their judgment against the respondent was only granted more than two months after the petition was first presented and this judgment had not crystallised until almost 10 months after the petition was first presented. Therefore the applicant's right to rank as creditor for the purpose of r 33 of the 1972 Rules could not be considered (see paras 10–14).

(2) Furthermore, the presumption that a company is unable to pay its debts only arises when all the relevant requirements under s 218(2)(a) of the Act have been fulfilled. One of the requirements stipulates that a creditor's right to present a winding up petition against a company only arises after the statutory notice under s 218 is served on the company and the company has within three weeks failed or neglected to satisfy the demand of the notice. In the present case, there was no evidence to show that the applicants had served the statutory notice under s 218(2)(a) of the Act at any time on the respondent company. Therefore, the creditors had no status to apply to substitute themselves as petitioners under r 33(1) of the 1972 Rules (see paras 19–20).

[Bahasa Malaysia summary

Pada 30 Oktober 2006, Teoh Vin Sen, pempetisyen, telah mengemukakan petisyen penggulungan terhadap True Creation Sdn Bhd, responden. Pada 17 Januari 2007, 27 pemiutang penghakiman ('pemiutang-pemiutang') telah mendapat penghakiman terhadap syarikat responden dengan ganti rugi ditaksirkan di hadapan pendaftar. Jumlah atau kuantum ganti rugi yang perlu dibayar telah ditaksirkan pada 31 Mei 2007 dan kos yang dikenakan cukai

sejumlah RM22,956.50 telah diberikan kepada pemiutang-pemiutang. Pemiutang-pemiutang berasa tidak puas hati dengan kos tersebut telah memfailkan semakan semula ke atas kos yang dikenakan cukai dan berikutan itu pada 16 Ogos 2007 mahkamah telah memerintahkan bahawa jumlah RM37,956.50 termasuk yuran alokatur dibayar oleh syarikat responden kepada pemiutang-pemiutang. Suatu notis statutori di bawah s 218 Akta Syarikat 1965 ('Akta'), berkaitan perintah bertarikh 16 Ogos 2007 untuk jumlah RM37,956.50, kemudiannya telah diserahkan ke atas syarikat responden di alamat berdaftar dan alamat perniagaannya. Pada 18 September 2007, pempetisyen telah hadir di mahkamah terbuka untuk menarik balik petisyen tersebut atas alasan bahawa hutang tersebut telah dijelaskan sepenuhnya oleh syarikat responden. Di peringkat tersebut pemiutang-pemiutang telah membantah usul pempetisyen untuk menarik balik petisyen tersebut dengan mengaku janji untuk memfailkan permohonan penggantian pempetisyen-pempetisyen dalam petisyen penggulungan tersebut. Ini adalah permohonan pemiutang-pemiutang menurut k 33(1) Kaedah-Kaedah (Penggulungan) Syarikat 1972 ('Kaedah-Kaedah 1972'), untuk perintah agar mereka digantikan sebagai pempetisyen-pempetisyen dalam petisyen penggulungan tersebut berdasarkan penghakiman yang mereka telah peroleh terhadap syarikat responden pada 17 Januari 2007 atau secara alternatif pada 16 Ogos 2007 apabila ganti rugi dan kos yang ditaksirkan telah disahkan dan bahawa kedua-dua tarikh tersebut adalah sebelum tarikh perbicaraan permohonan mereka untuk penggantian sebagai pempetisyen-pempetisyen, iaitu pada 11 Disember 2007. Pemiutang-pemiutang selanjutnya menghujahkan bahawa sebagai pemiutang-pemiutang sokongan mereka mempunyai hak di bawah k 33 Kaedah-Kaedah 1972 untuk digantikan sebagai pempetisyen-pempetisyen. Responden menegaskan bahawa pemiutang-pemiutang hanya boleh menggantikan diri mereka sebagai pempetisyen-pempetisyen jika mereka mempunyai hak untuk mengemukakan petisyen tersebut wujud pada tarikh semasa petisyen tersebut dikemukakan oleh pempetisyen terdahulu, iaitu pada 30 Oktober 2006. Satu-satunya isu di hadapan mahkamah dalam permohonan ini adalah sama ada pemiutang-pemiutang mempunyai hak untuk menggantikan pempetisyen dan meneruskan petisyen penggulungan bertarikh 30 Oktober 2006 terhadap syarikat responden.

Diputuskan, menolak permohonan dengan kos:

(1) Memandangkan s 219(2) Akta menetapkan bahawa 'the winding up petition will be deemed to have commenced at the time of the presentation of the petition for winding up', pemohon yang berniat untuk meneruskan petisyen hendaklah menunjukkan bahawa pada masa petisyen dikemukakan pertama kali oleh pempetisyen terdahulu

dia mempunyai hak untuk mengemukakan petisyen tersebut. Fakta permohonan ini menunjukkan bahawa pada masa petisyen tersebut dikemukakan oleh pempetisyen terdahulu pada 30 Oktober 2006, pemiutang-pemiutang bukan pemiutang-pemiutang kepada responden kerana penghakiman mereka terhadap responden hanya diberikan dua bulan selepas petisyen tersebut pertama kali dikemukakan dan penghakiman ini belum terlaksana sehingga 10 bulan selepas petisyen tersebut pertama kali dikemukakan. Oleh itu hak pemohon untuk dianggap sebagai pemiutang bagi tujuan k 33 Kaedah-Kaedah 1972 tidak boleh dipertimbangkan (lihat perenggan 10–14).

(2) Tambahan pula, andaian bahawa sebuah syarikat tidak mampu membayar hutangnya hanya timbul apabila semua keperluan relevan di bawah s 218(2)(a) Akta telah dipenuhi. Salah satu daripada keperluan tersebut menetapkan bahawa hak pemiutang untuk mengemukakan petisyen penggulungan terhadap sebuah syarikat hanya timbul selepas notis statutori di bawah s 218 diserahkan ke atas syarikat tersebut dan syarikat tersebut dalam masa tiga minggu gagal atau cuai untuk mematuhi tuntutan notis tersebut, Dalam kes ini, tiada keterangan menunjukkan bahawa pemohon-pemohon telah mengemukakan notis statutori di bawah s 218(2)(a) Akta pada bila-bila masa ke atas syarikat responden. Oleh itu, pemiutang-pemiutang tidak mempunyai kedudukan untuk memohon menggantikan diri mereka sebagai pempetisyen-pempetisyen di bawah k 33(1) Kaedah-Kaedah 1972 (lihat perenggan 19–20).]

Notes

For cases on winding up petition, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1321–1456.

Cases referred to

Bank Industri & Teknologi Malaysia Bhd v Alam Building Systems Sdn Bhd [2006] 4 MLJ 405 (refd)

Lindeteves-Jacoberg (Malaya) Sdn Bhd v Electrical Switchgears Automation (M) Sdn Bhd [1999] 5 MLJ 530 (folld)

Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd [1989] 3 MLJ 172 (refd)

Perak Pioneer Ltd v Petroliam Bhd [1986] 3 WLR 105 (distd)

Legislation referred to

Companies Act 1965 ss 218, 218(1)(e), 218(2)(a), 219(2)
Companies (Winding Up) Rules 1972 rr 33, 33(1)
Companies Winding Up Rules [HK] r 33

Hargopal Singh (Hargopal Singh & Co) for the applicants.
Adnan Seman (Abdul Aziz & Associates) for the respondent.

Ramly Ali J:

[1] Enclosure 14 is an application by the 27 supporting creditors, who are also the plaintiffs in Civil Suit No S4–22–1181 of 2003, who had on 17 January 2007 obtained judgment in their behalf for damages against the respondent company, for an order that they be substituted as the petitioners to the present winding up petition against the respondent company pursuant to r 33(1) of the Companies (Winding Up) Rules 1972, and that costs be paid out from the assets of the respondent company.

[2] The grounds of this applications are as follows:

(a) that all the 27 applicants have on 17 January 2007 obtained an order (in S4 suit) against the respondent for damages to be assessed. The assessment for damages is fixed for decision before the registrar on 13 February 2008 together with on allocatur dated 16 August 2007 for the sum of RM37,956.50;

(b) that the court has assessed the cost of the proceedings and vide order dated 16 August 2007 ordered that the sum of RM37,956.50 including the allocatur fee to be paid by the respondent to the plaintiffs. That a notice of intention to appear in the present proceedings has been filed on 6 August 2007;

(c) that a s 218 notice has been served on the respondent on 5 September 2007 at the registered address and on 4 September 2007 at the business address. The affidavit of service of Vijaya a/l Segaran duly affirmed on 18 September 2007 has been filed in this court.

UNDISPUTED FACTUAL BACKGROUND

[3] The undisputed facts relevant to this application are as follows:

(i) On 30 October 2006, the present winding up petition was presented by the petitioner;

(ii) On 17 January 2007 the Kuala Lumpur High Court vide Civil Suit No S4–22–181 of 2003 (S4 suit) granted the applicants judgment of declaration terminating all the contracts and damages to be assessed, interest and costs;

(iii) On 31 May 2007, the court taxed the costs and granted costs of RM22,956.50;

(iv) The applicants being dissatisfied filed a review on costs taxed and on 16 August 2007 increased costs to RM37,956.50;

(v) On 4 September 2007 the applicants serves a statutory notice under s 218 in respect of order dated 16 August 2007 for RM37,956.50 on the respondent;

(vi) On 18 September 2007, the petitioner appeared in court to withdraw the petition in open court as the debt has been fully settled by the respondent but objected by the applicants' solicitor who promised to file application for substitution (ie the present application).

ISSUE

[4] The only issue that need to be decided by this court is:

(i) whether the applicant have the right to substitute the petitioner to continue the winding up petition dated 30 October 2006 against the respondent.

THE APPLICANTS' CONTENTIONS

[5] The applicants contended that the applicants' right to present the petition against the respondent existed on 17 January 2007 when the court in Civil Suit No S4–22–181 of 2003 (S4 suit) granted the order dated 17 January 2007 for damages to be assessed. The amount or quantum of damages payable has yet to be determined. Nevertheless, the allocatur for the sum of RM37,956.50 was allowed on 16 August 2007. Both dates are before the application in encl 14 herein which has been fixed for hearing for the first time on 11 December 2007.

[6] Hence, the applicants further contend that they, as supporting creditors have the right to be substituted as the petitioner under r 33 of the Companies (Winding Up) Rules 1972.

THE RESPONDENT'S CONTENTIONS

[7] The respondent, on the other hand submits that in order for the applicants to succeed in their application herein, they must have the right to present the petition at the date when the petition is presented by the petitioner, which is on 30 October 2006; and not at the date when the present application (encl 14) for substitution is sought as submitted by the applicants ie 11 December 2007.

RULE 33 OF THE COMPANIES WINDING UP RULES 1972

[8] The relevant provisions for consideration on this matter is r 33, of the Companies (Winding Up) Rules 1972, which states as follows:

(1) When a petitioner is not entitled to present a petition or, whether so entitled or not, where he —

(a) fails to take all the steps prescribed by these Rules preliminary to the hearing of the petition;

(a) consent to withdraw his petition or to allow it to be dismissed or the hearing to be adjourned; or

(b) fails to appear in support of this petition when it is called on in Court on the day originally fixed for the hearing thereof or any day to which the hearing has been adjourned or if appearing does not apply for an order in terms of the prayer of his petition,

the Court may upon such terms as it thinks just substitute as petitioner any person who, in the opinion of the Court, would have a right to present the petition and who is desirous of proceeding with the petition.

[9] Rule 33(1) gives the discretion to the court to substitute as petitioner any person who *would have a right to present the petition* and who is desirous of proceeding with the petition. The word 'the petition' in r 33(1) refers to the earlier petition filed by the petitioner. The intending petitioner must be some one who has the right to present the earlier petition (see *Bank Industri & Teknologi Malaysia Bhd v Alam Building Systems Sdn Bhd* [2006] 4 MLJ 405). Rule 33(1) is silent as to when the intending petitioner must have that 'right' to present the said petitioner: Is it at the time when the earlier petition was presented or filed, or is it at the time when the application for substitution was filed?

[10] The real position of law as to the right of the applicants to substitute the petitioner is not that they must have the right to present the petition at the date when the substitution is sought as submitted by them but the applicants must have the right to present the petition at the date when the petition is presented by the earlier petitioner which is on 30 October 2006.

[11] The court is of the view that the above proposition represent the correct position of the law because if a winding up order is eventually granted, the order relates back to the date when the petition was first presented by the earlier petitioner, because s 219(2) of the Companies Act 1965 stipulates that 'winding up will be deemed to have commenced at the time of the presentation of the petition for the winding up …'. Therefore, the applicant who is desirous of proceeding with the petition must show that at the time of the first presentation of the petition by earlier petitioner, he would has had a right to present the said petition.

[12] In the present application, the winding up petition was first presented by the earlier petitioner (Teoh Vin Sen) on 30 October 2006. The judgment obtained by the applicants vide Civil Suit No S4–22–181 of 2003 was only granted on 17 January 2007 (more than two months after the petition was first presented). The judgment has not crystallised yet at that time as damages need to be assessed and costs to be taxed. Only on 31 May 2007, the court taxed the costs and after review on 16 August 2007, the costs were finally fixed at RM37,956.50. (almost ten months after the petition was presented).

[13] The above facts clearly show that at the time when the petition was presented on 30 October 2006, the applicants was not creditors to the respondent and therefore have no right to present the said petition against the respondent.

[14] The first issue that need to be determined in an application for substitution under r 33(1) is the status of the applicant. If the judgment obtained or the crystallisation of debt occurred well after the date of presentation of the winding up petition, then the applicant's right to rank as creditor for the purpose of r 33(1) cannot be considered (see *Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd* [1989] 3 MLJ 172).

[15] The applicants rely on the case of *Lindeteves-Jacoberg (Malaya) Sdn Bhd v Electrical Switchgears Automation (M) Sdn Bhd* [1999] 5 MLJ 530, to support their contention that they are qualified to seek substitution as petitioners because they would have a right to present a petition at the date when their application for substitution was filed in court (ie on 25 September 2007).

[16] After going through the details of the full judgment in *Lindeteves-Jacoberg*'s case, the court cannot fully agree with the applicant on this issue. The main issue in that case is whether the words 'would have' (as appear in r 33(1) of the Companies (Winding Up) Rules 1972) in relation to a right to present a petition, indicates a future qualification. In that case the court held that those words do not indicate futurity. In that case, the court referred to the Privy Council's judgment in *Perak Pioneer Ltd v Petroliam Bhd* [1986] 3 WLR 105, at p 112C–G where the Privy Council analysed r 33 of the Companies Winding Up Rules of Hong Kong, which is not identical to our r 33(1), where, by the way, the thing that the intending substitute would have a right to present is expressed to be 'a petition', not as 'the petition' as appeared in our r 33(1). In passing the court commented: 'From the passage at p 112G, it may be understood that since the substitution was sought, he qualified as a person who 'would have a right to present a petition.'

[17] The phrase was taken from p 112G of the Privy Council judgment in *Perak Pioneer*'s case, dealing with a provision in Hong Kong Rules which is not identical with our r 33(1). The citation of the phrase is not intended to be taken as decision or ruling of the court in *Lindeteves-Jacoberg* case.

[18] What is more important in *Lindeteves-Jacoberg*'s case which represent decision or ruling of the court is expressed in the following passage (at p 111, paras d–f): 'Where the case of an intending petitioner depends on the presumption under s 218(2)(a) for proof of the debtor company's inability to pay its debts, the petitioner would have no case to bring until the presumption has arisen after the statutory notice has been issued and served and the company has, for three weeks, failed to satisfy the demand of the statutory notice. Until the presumption arises, the intending petitioner would have no cause of action to be qualified to present a petition. It must follow that he would have no cause of action to qualify to be substituted as a petitioner under r 33(1). When a petitioner expresses a desire to withdraw his petition, the respondent company is entitled, were it not for a proposed substitution, to be freed of the petition, and it would not be fair to the company to allow the petition to remain hanging over its head for the sake of enabling another party to qualify for substitution who is known for certain to be not yet qualified.'

[19] The court is in full agreement with the decision in *Lindeteves-Jacoberg*'s case as stated above. Rule 33(1) states about 'a right to present the petition' ie the particular petition filed by the original petitioner. Presentation of a petition takes place when the petition to wind up the respondent company is filed in court. Where a petition is based on s 218(1)(e) and 218(2)(a) of the Companies Act 1965, presentation of the petition can only be instituted in court upon the petitioner has complied with the relevant requirements under s 218(2)(a) ie:

(a) The debt in question must be more than RM500;

(b) The creditor must have served a notice under s 218(2)(a) on the company demanding for payment the debt due;

(c) Within three weeks from the service of the notice, the company neglected to pay the sum demanded, or to secure or compound for it to the reasonable satisfaction of the creditor;

(d) The presumption that a company is unable to pay it's debts only arises when all the above elements are fulfilled. Only at that stage, a creditor is entitled to present winding up petition against the company, but not before that. In other words, a creditor's right to present a winding up petition against a company arises only after the statutory notice under s 218 is served on the company and the company has within three

weeks failed or neglected to satisfy the demand of the said notice. Therefore, a person who has not served the statutory notice under s 218(2)(a) on the company has no 'right to present the petition', even though he is desirous of proceeding with the petition.

[20] In the present case, there is no evidence to show that the applicants have served the statutory notice under s 218(2)(a) at any time on the respondent. That being the case, the court is of the view that the applicants have no status to apply for substitution as petitioner under r 33(1) of the Companies (Winding Up) Rules 1972. The judgment dated 17 January 2007 vide Civil Suit No S4–22–181 of 2003 which is after the petition was presented clearly shows that the amount of damages is to be assessed; and the allocator dated 16 August 2007 for the sum of RM37,956.50 referred to by the applicants also crystallised after the petition was presented.

[21] As such, the court finds that there is no legal basis to allow the applicants to substitute the petitioner in the present winding up proceedings against the respondent. The applicants are always at liberty to initiate a fresh winding up proceedings against the respondent by serving their own statutory notice under s 218(2)(a) and thereafter to present a fresh petition, if the respondent fails to comply with the said notice within three weeks, after all the debts are determined and crystallised.

CONCLUSION

[22] On the above considerations, the court dismisses the applicants' application vide encl 14, with costs.

Application dismissed with costs.

Reported by K Nesan